File: [redacted]

Date: OCT 15 1998

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Murray D. Hilts, Esquire

ON BEHALF OF SERVICE: Carmel J. Fisk
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

In an oral decision rendered on February 17, 1998, an Immigration Judge ordered the respondent removed pursuant to the charges set forth above. The respondent has appealed from that decision. We will dismiss the respondent's appeal.[1]

The respondent is a native and citizen of El Salvador who entered the United States without inspection in 1983 (Tr. at 21). In 1990, the respondent adjusted his status to that of a lawful immigrant pursuant to an amnesty program (Tr. at 21-22). On August 21, 1996, a California state court found the respondent guilty of violating section 273.5(a) of the California Penal Code for inflicting corporal injury on his spouse. The respondent was sentenced to serve 2 years' confinement for this conviction.

On November 18, 1997, the Immigration and Naturalization Service issued a Notice to Appear (Form I-862), charging the respondent with removability for committing an aggravated felony pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act. The Service alleged that the respondent's conviction was a crime of violence for which the respondent had been

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[1] We note that the respondent's attorney requested by letter, submitted to this Board on July 13, 1998, a copy of the transcript of proceedings (transcript) and a revised briefing schedule. He asserts that the respondent did not receive a copy of the transcript. However, the record includes a notice, dated May 4, 1998, indicating that a copy of the transcript was sent to the respondent and that a brief had to be filed no later June 3, 1998. Indeed, the respondent filed a brief with this Board on July 14, 1998. The respondent has not presented any evidence supporting his contention and we find any assertion that he did not receive a copy of the transcript to be unsupported by the evidence of record. Accordingly, we deny the request of the respondent's attorney to receive a copy of the transcript or to reset a briefing schedule.

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sentenced to more than 1 year in prison and pursuant to the definition of aggravated felony, section 101(a)(43)(F), the respondent is removable by clear and convincing evidence. The Immigration Judge agreed and concluded that the respondent had committed an aggravated felony and was therefore removable and not eligible for any forms of relief.

On appeal, the respondent argues that the amended aggravated felony definition may not be applied to his conviction. His analysis continues that under the previous definition, his conviction does not amount to an aggravated felony because he received only a 2-year, not a 5-year, sentence for incarceration. The respondent concedes that he may have committed a crime involving moral turpitude but such a conviction does not preclude him from qualifying for relief under section 212(c) of the Act, 8 U.S.C. § 1182(c) (1994). We will address each one of the respondent's contentions.

In his first argument on appeal, the respondent objects to the retroactive application of the definition of aggravated felony under section 101(a)(43) of the Act. Pursuant to the Illegal Immigration and Immigrant Reform Act of 1996, the amendments to the aggravated felony definition in section 101(a)(43) of the Act apply retroactively. 8 U.S.C. § 1101(a)(43) (notwithstanding any other provision of law (including any effective date), the term [aggravated felony] applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.). See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Division C of Pub. L. No. 104-208, § 321(a), 110 Stat. 3009. Where Congress has clearly stated that a statute is to be applied retroactively, any presumption against its retroactive application cannot stand. Matter of Yeung, Interim Decision 3297 (BIA 1997). See INS v. Phinpathya, 464 U.S. 183 (1984) (where statutory language is clear on its face, there is no need to inquire into Congressional intent). Accordingly, we do not find the respondent's first argument persuasive.

Applying the amended definition to this case, we find that the respondent committed an aggravated felony pursuant to section 101(a)(43)(F) of the Act. This section defines an aggravated felony as "a crime of violence (as defined in section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least 1 year." The term "crime of violence" is defined in 18 U.S.C. § 16 as

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In determining whether a particular offense is a "crime of violence" under this definition, we have held that either the elements of the offense must be such that physical force is an element of the crime, or that the nature of the crime -- as evidenced by the generic elements of the offense -- must be such that its commission ordinarily would present a risk that physical force would be used against the person or property of another, irrespective of whether the risk develops or harm actually occurs. Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994).

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As stated in Matter of Alcantar, supra, we apply the "generic" or "categorical" approach to analyzing whether a conviction meets this test.

> That is, analysis under 18 U.S.C. § 16(b) requires first that the conviction be a felony; and, if it is, that the "nature of the crime -- as elucidated by the generic elements of the offense -- is such that its commission would ordinarily present a risk that physical force would be used against the person or property of another" irrespective of whether the risk develops or harm actually occurs.

Matter of Alcantar, supra, at 812-13 (citations omitted); see United States v. Sherman, 928 F.2d 324 (9th Cir.), cert. denied, 502 U.S. 842 (1991); United States v. Jackson, 986 F.2d 312 (1993). Stated differently, "offenses within the scope of section 16(b) have as a commonly shared characteristic the potential of resulting in harm." Matter of Alcantar, supra, at 809, citing United States v. Gonzalez-Lopez, 911 F.2d 542 (11th Cir. 1990), cert. denied, 500 U.S. 933 (1991).

This approach does not extend, however, to consideration of the underlying facts of the conviction. Matter of Alcantar, supra, at 813. Consequently, for the respondent's crime to fall within the purview of 18 U.S.C. § 16(b), it must be an offense for which the nature of the crime involves a substantial risk that physical force may be used against the person or property of another during the commission of the offense; in other words, the crime must have "the potential of resulting in harm." Id. at 809.

The respondent violated section 273.5(a) of the California Penal Code which defines a felonious act as occurring when "any person [ ] willfully inflicts upon his or her spouse, or any person [ ] willfully inflicts upon any person with whom he or she is cohabiting, or any person [ ] willfully inflicts upon any person who is the mother or father of his or her child, corporal injury resulting in a traumatic condition."

We find the respondent's crime to be one of violence as defined by 18 U.S.C. § 16(b). Section 273.5(a) prohibits an individual from inflicting bodily harm on his spouse or child. As such, the nature of this crime involves not just a substantial risk that physical force may be used against another, but rather requires that harm actually results. See People v. Abrego, 25 Cal. Rptr. 736 (App. 4 Dist. 1993). Accordingly, we conclude that the respondent's felony conviction for inflicting corporal injury on his spouse, as defined by section 273.5(a) of the California Penal Code, is a crime of violence.[2] Accordingly, as the respondent was sentenced to a term of imprisonment of at least 1 year for that offense, the respondent has been convicted of an aggravated felony under section 101(a)(43)(F) of the Act.

The respondent's next contention is that he qualifies for relief pursuant to section 212(c). A waiver of inadmissibility under section 212(c) is not a form of relief that is available in removal proceedings. See section 304(b) of IIRIRA. Moreover, since the respondent has been convicted of an aggravated felony, he is statutorily ineligible for cancellation of removal. See section 240A(a)(3) of the Act. Accordingly, the respondent's appeal will be dismissed.

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[2] This Board has also found this offense to be a crime involving moral turpitude. Matter of Tran, Interim Decision 3271 (BIA 1996).

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ORDER: The respondent's appeal is dismissed.

FOR THE BOARD